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Ismail bin Mohmad & Anor v Ismail bin Husin & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–22–868 OF 1999
ARIFIN ZAKARIA FCJ
25 JUNE 2005

B

Civil Procedure — Judicial precedent — Federal Court — Issue of whether findings of Federal Court a mere obiter — Doctrine of stare decisis

Land Law — Indefeasibility of title and interests — Fraud — Misrepresentation — Whether fourth defendant purchaser in good faith for valuable consideration — Whether failure to make an enquiry on the valuations of the lands points to a lack of good faith

C

Land Law — Indefeasibility of title and interests — Fraud — Misrepresentation — Whether second defendant and fourth defendant, party or privy to fraud and misrepresentation — Doctrine of constructive notice

D

The plaintiffs were the registered proprietors of pieces of land ('the said lands'). The first plaintiff had since passed away and had been duly substituted by his son. They entered into a sale and purchase agreement ('the agreement') where first defendant agreed to purchase the said lands for a total consideration of RM7.5m. The agreement was prepared by the second defendant. Upon enquiry, the plaintiffs discovered that the said lands had been charged to the fourth defendant as security for a term loan of RM16m to the fifth defendant, out of which RM10m had already been disbursed to the fifth defendant. The plaintiffs' case was that the intention to defraud the plaintiffs had been conceived even before the agreement was entered into by the plaintiffs. The scheme was that the first defendant will enter into a sale and purchase agreement with the plaintiffs for the purchase of the said lands; and without the knowledge of the plaintiffs, the said lands will then be charged to a financial institution as security for a loan to the fifth defendant. The loan amount will be far in excess of the purchase price of the said lands. In the present case the purchase price of the said lands was only RM7.5m, but the said lands were subsequently charged to the fourth defendant as security for a loan facility of RM16m. Under the annexure to the charge, the plaintiffs, as guarantors, were further rendered liable to the fourth defendant for the sum not exceeding RM23,528,346 in the event the fifth defendant defaulted in servicing the loan.

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Held:

(1) From the evidence it was obvious that the first defendant had entered into the agreement not with the genuine intention of acquiring the said lands but merely to use the said lands as security for a loan to be obtained from a financial institution. All these were done not only with the knowledge of second defendant but with his full cooperation. The transaction could not have gone through without the second defendant's co-operation.

I

Both the charge and the charge annexure emanated from the second defendant's office and presumably the forgery must have originated from there as well. Even though there was no clear evidence as to who actually forged the plaintiffs' signatures on the charge and the charge annexure, but one thing was clear it could not have been done without the second defendant's knowledge or connivance. It was, therefore, not unreasonable to assert that the second defendant was not just privy to the fraud and/misrepresentation, but he was in fact a party to the fraud and/or misrepresentation (see para 14).

(2) However, that the same could not be said of fourth defendant. There was no evidence showing that the fourth defendant or any of its officer was privy to or a party to the fraud or misrepresentation. In the present case knowledge of second defendant could not appropriately be imputed to the fourth defendant who was not privy to the fraud. The doctrine of constructive notice clearly was inapplicable to the facts in the present ease. The interest of the fourth defendant was not defeasible under s340(2)(a) of the National Land Code ('NLC') (see paras 16–18).

(3) The finding of the court in *Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2005] 1 CLJ 565 was not a mere obiter but the *ratio decidendi* in the case. This was confirmed by the finding of the Federal Court. The decision of the Federal Court was binding on this court despite whatever criticism that may be levelled against it. To hold otherwise would be to go against the principle of *stare decisis* (see para 32).

(4) It would be going too far to require the fourth defendant, a bank, to make an enquiry on the valuations of the said lands. It was a matter strictly within the discretion of the bank whether to do so or not. Failure to make such an enquiry could not be construed as pointing to the lack of good faith on the part of the fourth defendant. Similarly, it was for the fourth defendant to decided whether to accept the valuation done by the fifth defendant or to have a further valuation done by their own valuer. Failure to do so could not be treated as evident of lack of good faith (see para 33).

(5) In the circumstances, the fourth defendant, being the purchaser in good faith for valuable consideration, had acquired an indefeasible interest in the said lands notwithstanding that the signatures on the charge document and the annexure were forged (see para 34).

[**Bahasa Malaysia summary**

Plaintif-plaintif adalah tuan punya berdaftar beberapa bidang tanah ('tanah tersebut'). Plaintif pertama telah meninggal dunia dan diganti oleh anak lelakinya. Mereka memasuki satu perjanjian jual beli ('perjanjian tersebut') dimana defendan pertama bersetuju untuk membeli tanah tersebut dengan

jumlah balasan sebanyak RM7.5juta. Perjanjian tersebut telah disediakan oleh defendan kedua. Setelah membuat pertanyaan, plaintif-plaintif mendapati bahawa tanah tersebut telah digadaikan kepada defendan keempat sebagai jaminan kepada satu pinjaman berjangka sebanyak RM16 juta kepada defendan kelima, di mana RM10 juta telah dikeluarkan kepada defendan kelima. Plaintif-plaintif mengatakan bahawa niat untuk menipu plaintif-plaintif telah dibuat sejak sebelum perjanjian tersebut di masuki oleh plaintif-plaintif. Rancangannya adalah defendan pertama memasuki satu perjanjian jual beli dengan plaintif-plaintif untuk membeli tanah tersebut; dan tanpa pengetahuan plaintif-plaintif, tanah tersebut akan digadaikan kepada sebuah institusi kewangan sebagai jaminan untuk satu pinjaman kepada defendan kelima. Jumlah pinjaman adalah jauh lebih tinggi dari harga belian tanah tersebut. Dalam kes semasa harga belian tanah tersebut hanyalah RM7.5 juta, tetapi tanah tersebut kemudiannya digadaikan kepada defendan keempat sebagai jaminan untuk satu kemudahan pinjaman sebanyak RM16juta. Dalam tambahan kepada gadaian, plaintif-plaintif, sebagai penjamin-penjamin, adalah bertanggungjawab kepada defendan keempat untuk jumlah tidak melebihi dari RM23,528,346 jika defendan kelima ingkar membayar pinjaman tersebut.

Diputuskan:

(1) Dari keterangan ianya jelas yang defendan pertama telah memasuki perjanjian tersebut bukan dengan niat ikhlas untuk memperoleh tanah tersebut tetapi hanya untuk menggunakan tanah tersebut sebagai jaminan kepada pinjaman yang akan diperoleh dari sebuah institusi kewangan. Kesemua ini dilakukan bukan hanya dengan pengetahuan defendan kedua tetapi dengan kerjasama penuhnya. Transaksi ini tidak boleh dilakukan tanpa kerjasama defendan kedua. Kedua-dua gadaian dan tambahan kepada gadaian yang berasal dari pejabat defendan kedua dan penipuan itu juga diandaikan berasal dari sana juga. Walaupun tiada keterangan jelas siapa sebenarnya yang memalsukan tandatangan-tandatangan plaintif-plaintif pada gadaian dan tambahan pada gadaian tersebut, tetapi satu perkara jelas adalah ianya tidak dapat dilakukan tanpa pengetahuan dan persubahatan defendan kedua. Dari itu bukannya tidak munasabah untuk mengatakan yang defendan kedua bukan hanya privi kepada fraud dan/ salah nyata itu, tetapi beliau juga sebenarnya adalah pihak kepada fraud dan/atau salah nyata itu (lihat perenggan 14).

(2) Walau bagaimanapun, yang sama tidak boleh dikatakan terhadap defendan keempat. Tiada keterangan yang menunjukkan yang defendan keempat atau mana-mana satu dari pegawainya adalah privi kepada atau satu pihak kepada fraud atau salah nyata itu. Dalam kes semasa pengetahuan defendan kedua tidak boleh dikaitkan dengan defendan keempat yang bukan privi kepada fraud tersebut. Doktrin notis konstruktif jelas tidak terpakai kepada fakta-fakta kes semasa. Kepentingan defendan

keempat tidak boleh sangkal di bawah s 340(2)(a) Kanun Tanah Negara ('KTN') (lihat perenggan 16–18).

(3) Pendapat mahkamah di dalam *Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2005] 1 CLJ 565 bukan hanya obiter tetapi merupakan *ratio decidendi* dalam kes itu. Ianya disahkan oleh pendapat Mahkamah Persekutuan. Keputusan Mahkamah Persekutuan mengikat mahkamah ini walau apa pun komen dikatakan terhadapnya. Untuk memutuskan yang sebaliknya adalah bercanggah dengan prinsip *stare decisis* (lihat perenggan 32).

(4) Ianya adalah terlampau untuk menghendaki defendan keempat, sebuah bank untuk membuat pertanyaan berkenaan dengan penilaian tanah tersebut. Ianya adalah satu perkara yang jatuh dalam budi bicara sesebuah bank untuk sama ada berbuat demikian atau tidak. Kegagalan untuk membuat satu pertanyaan tidak boleh dikatakan sebagai petunjuk kepada kekurangan suci hati pada pihak defendan keempat. Begitu juga, ianya terserah kepada defendan keempat sama ada untuk menerima penilaian yang dibuat oleh defendan kelima atau untuk membuat penilaian lanjut oleh juru nilainya. Kegagalan berbuat demikian, tidak boleh dianggap sebagai keterangan kekurangan suci hati (lihat perenggan 33).

(5) Dalam keadaan ini, defendan keempat, sebagai seorang pembeli yang suci hati untuk balasan bernilai, telah memiliki kepentingan yang tak boleh sangkal dalam tanah tersebut walaupun tandatangan di dalam dokumen gadaian dan tambahan adalah palsu (lihat perenggan 34).]

Notes

For cases on fraud, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2667–2690, 2731.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001]1 MLJ 241 (refd)
Adorna Properties Sdn Bhd v Kobchai Sosothikul [2005] 1 CLJ 565 (refd)
Assets Co v Mere Roihi [1905] AC 176 (refd)
Banco Exterior International SA v Thomas [1977] 1 WLR 221 (refd)
Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62 (refd)
Datuk Jasinder Singh & Ors v Tarn Raiaratnam [1983] 2 MLJ 196 (refd)
Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85 (refd)
EL Ajou v Dollar Land Holdings plc [1994] 2 All ER 685 (refd)
Jasbir Kaur & Anor v Tharumber Singh [1974] 1 MLJ 224 (refd)
Lee Yoke Chye v Toh Thean Bock& Co [1987] 1 MLJ 122 (refd)
Loke Yew v Port Swettenham Rubber Co Ltd [1913] AC 491 (refd)
Mohamed Isa v Haji Ibrahim [1968]1 MLJ 186 (refd)
PJTV Denson (M) Sdn Bhd v Roxy (M) Sdn Bhd [1980] 2 MLJ 136 (refd)
Toh Thean Hock v Kemaiuan Perwira Management Corpn. Sdn Bhd [1988] 1 MLJ 116 (refd)

Legislation referred to

National Land Code 1965 s 340(2), (b), (3)
Rules of the Federal Court 1995 r 137

Jerald Gomez (Jerald Gomez & Associates) for the plaintiffs.
M Danish (Ahmad Badri Hj Idris with him) (Ram Reza & Muhammad) for the first defendant.
Azlan bin Khamis (Nasira Aziz) for the second and third defendants.
Fuad Husaini (Othman Hashim & Co) for the fourth defendant.

Arifin Zakaria FCJ:

[1] The plaintiffs, husband and wife, were the registered proprietors pieces of land namely, Lot No 1334, Lot No 1335 and Lot No 1336, all in Mukim 15, District of Seberang Perai Selatan, Negeri Pulau Pinang ('the said lands'). The first plaintiff had since passed away and had been duly substituted by his son, Abu Bakar bin Ismail, by order of court dated 28 September 2004. They entered into a sale and purchase agreement dated 30 July 1999 ('the agreement') whereby the plaintiffs agreed to sell and the first defendant agreed to purchase the said lands for a total consideration of RM7.5m. The agreement was prepared by the second defendant, an advocate and solicitor, practising under the name of Sajali & Aziz, the third defendant in the present suit. Under the agreement a sum of RM150,000 is to be paid on the date of the execution of the agreement and a further sum of RM50,000 is to be paid within a period of one month from the date of the agreement, and the balance sum of RM7,300,000 is to be paid to the third defendant as stake holder within three months from the date of the agreement.

[2] It is not in dispute that the two sums of RM150,000 and RM50,000 were paid by the first defendant as agreed, leaving the balance sum of RM7,300,000 remaining unpaid. Upon enquiry, the plaintiffs discovered that the said lands had been charged to the fourth as security for a term loan of RM16m to the fifth defendant, out of which RM10m had already been disbursed to the fifth defendant. The plaintiffs claimed that they have no knowledge of the charge and that they had never signed the charge document 'P1–ID' nor the charge annexure 'P1–E'. They further claimed that what purported to be their signatures on the charge document and the charge annexure were forgeries.

[3] Prior to the hearing of this suit, the plaintiffs obtained an order of the learned senior assistant registrar for examination of these documents by the Government Chemist. The Chemist's report was tendered and marked as 'P–1'. In his evidence Mr Lim Yoh Chan (SP–2), the Chemist, confirmed that the signatures in documents 'P1–A' and 'P1–E' were of different authorship from the specimen signatures of the plaintiffs which were marked as 'P1–O', 'P1–A', 'P1–B', 'P1–C'. The testimony of SP2 in this regard was never

challenged. Based on the above, learned counsel for the plaintiffs contended that the purported signatures of the plaintiffs were forgeries and not that of the plaintiffs.

[4] It is further alleged on behalf of the plaintiffs, that the charge came about as a result of the fraud and/or misrepresentation committed by first and the second defendants on the plaintiffs, and at all material times the second defendant was acting as solicitors of the fourth defendant in the preparation and presentation of the loan documentation. As such, it is contended for the plaintiffs that the second defendant was in law the agent of the fourth defendant.

[5] The plaintiffs' case, to put it briefly, is that the intention to defraud the plaintiffs had been conceived even before the agreement was entered into by the plaintiffs. The scheme was that the first defendant will enter into a sale and purchase agreement with the plaintiffs for the purchase of the said lands; and without the knowledge of the plaintiffs, the said lands will then be charged to a financial institution as security for a loan to the fifth defendant. The loan amount will be far in excess of the purchase price of the said lands. In the present case the purchase price of the said lands was only RM7.5m, but the said lands were subsequently charged to the fourth defendant as security for a loan facility of RM10m. Under the annexure to the charge, the plaintiffs, as guarantors, are further rendered liable to the fourth defendant for the sum not exceeding RM23,528,346 in the event the fifth defendant defaulted in servicing the loan.

[6] In the present case a sum of RM10m had already been disbursed to the fifth defendant and not a single payment had been made by the fifth defendant to the fourth defendant. According to first defendant, the manager of the fifth defendant (Wong Kim Leng), had absconded with the money to China.

[7] On the evidence before me, I agree with the plaintiffs' contention that the second defendant is not just privy to the fraud and/misrepresentation but was a central figure, in planning the whole scheme with the T1 defendant and the representatives of the fifth defendant. It is common ground that the third defendant, the firm of solicitors, was retained by the fourth defendant to prepare the necessary legal documentation for the loan, therefore, the legal consequence is that the sefond and third defendants were for all intent and purpose the agents of the fourth defendant in the said transaction. (See *Banco Exterior International SA v Thomas* [1977] 1 WLR 221; *EL Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685; *Toh Thean Hock v Kemaiuan Perwira Management Corpn. Sdn Bhd* [1988] 1 MLJ 116; *Lee Yoke Chye v Toh Thean Bock& Co* [1987] 1 MLJ 122.)

[8] It is submitted for the plaintiffs that in the circumstances, the interest registered by way of a charge in favour of the fourth defendant, is defeasible under one or more of the grounds set out in s 340(2) of the National Land Code ('NLC'). The relevant provisions of s 340 read:

340 Registration to confer indefeasible title or interest, except in certain circumstances:

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of he circumstances specified in sub-s (2)

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) Any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested.

EXCEPTIONS TO INDEFEASIBILITY UNDER SECTION 340(2)(A)

(i) Fraud

[9] The NLC does not defined what conduct may constitute fraud. The judicial interpretation of the term is found in the Privy Council's case of *Assets Co v Mere Roihi* [1905] AC 176 where at p 210 it said:

In *Waimaha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 at p 106 Lord Buckmaster observed as follows:

> If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear ....

[10] By fraud in these (Torrens) Acts is meant actual fraud, ie dishonesty of some sort, not what is called constructive or equitable fraud.

[11] This definition has been consistently followed by our courts. (See *Mohamed Isa v Haji Ibrahim* [1968]1 MLJ 186.) Raja Azlan Shah CJ (Malaya) (asHis Royal Highness then was) in the Federal Court case of *PJTV Denson (M) Sdn Bhd v Roxy (M) Sdn Bhd* [1980] 2 MLJ 136 at p 138 observed:

> Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean 'actual fraud, ie dishonesty of some sort' for which the registered proprietor is a party or privy. 'Fraud is the same in all courts, but such expressions as 'constructive fraud' are...inaccurate.' but 'fraud' ... implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled.' (per Romilly MR in *Green v Nixon* (1857) 23 Beav 530 & 535; 53 ER 208). Thus in *Waimih Sawmillins Co Ltd v Waione Timber Co Ltd* [1926] AC 101 & 106 it was said that 'if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent...'

[12] Where the registered purchaser's title is being challenged on the ground of fraud, Lord Lindley in *Assets Co*'s case observed as follows:

> The fraud which must proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents.

(ii) Misrepresentation

[13] 'Misrepresentation' in this context was said to mean 'fraudulent misrepresentation' and is a species of fraud (see *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491; *Datuk Jasinder Singh & Ors v Tarn Raiaratnam* [1983] 2 MLJ 196). In the latter case it has been said that the word 'or' appearing after 'fraud' in para (a) would appear to have a disjunctive effect and hence what requires to be proved is either actual fraud or fraudulent misrepresentation or both.

[14] Whether there exist fraud or fraudulent misrepresentation in a given case will depend on the facts and circumstances of the case. In this case it would appear from the evidence of the first defendant himself that he came to know from one Henry Voon that the fifth defendant was looking for land to be charged for the purpose of getting a loan. At that time arrangement had already been made by one Zolkeplee with Bank Rakyat (fourth defendant) for the loan. Further, according to second defendant, he and his firm, the third defendant, had been informed of the transaction and they agreed to act on behalf of fourth defendant in the said transaction. Therefore, from the evidence it is pretty obvious that the first defendant had entered into the sale and purchase agreement not with the genuine intention of acquiring the said lands but merely to use the said lands as security for a loan to be obtained from a financial institution. I am satisfied that all these were done not only with the knowledge of second defendant but with his full cooperation. The transaction could not have gone through without the second defendant's cooperation. Both the charge and the charge annexure emanated from the second defendant's office and presumably the forgery must have originated

from there as well. Even though there is no clear evidence as to who actually forged the plaintiffs' signatures on the charge and the charge annexure, but one thing is clear it could not have been done without the second defendant's knowledge or connivance. It is, therefore, not unreasonable to assert that second defendant was not just privy to the fraud and/misrepresentation, but he was in fact a party to the fraud and/or misrepresentation.

[15] In *Jasbir Kaur & Anor v Tharumber Singh* [1974] 1 MLJ 224 the Federal Court held that it was sufficient for the purpose of s 340(2) of the NLC to support an allegation of fraud or misrepresentation to prove that by means of fraud or misrepresentation the registration of the transfer was obtained and the first appellant there was a party to the fraud or misrepresentation. In the present case I am satisfied that the first the second defendants were privy to or a party to the fraud or misrepresentation. However, that the same could not be said of fourth defendant. There was no evidence before me showing that the fourth defendant or any of its officer was privy to or a party to the fraud or misrepresentation. As submitted by learned counsel for the fourth defendant there was not a shred of evidence to suggest the participation or involvement of the fourth defendant in the fraud. The fourth defendant was not at all involved in the sale transaction, neither was it the financier for the said transaction. The evidence conclusively shows that the fourth defendant was merely concerned with the provision of the loan to the fifth defendant for its working capital and for the purchase of machineries. There was nothing fraudulent about that. Perhaps the only thing that may militate against the fourth defendant is the fact that the second defendant was the solicitor acting on its behalf, therefore, in law he was the agent of the fourth defendant.

[16] It is, however, contended for the fourth defendant, relying on the authority *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 that knowledge of the fraud by second defendant in his capacity as solicitor of the fourth defendant could not be imputed to fourth defendant.

[17] The Federal Court in that case stated at p 88 as follows:

> Now the general rule is that the knowledge of a solicitor is the knowledge of the client, so that it is not. open to the client to say that the solicitor did not disclose the true facts to him. Thus in *Rolland v Hart* (1870) 6 Ch App 678 at p 681 which was followed by the High Court of Australia in *Stuart v Kingston* (1923) 32 CLR 309 Lord Hatherley LC said:
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> > Then the only question is, what is actual notice? It has been held over and over again that notice to a solicitor of a transaction, and about a matter as to which it is part of his duty to inform himself, is actual notice to the client. Mankind would not be safe if it were held that, under such circumstances, a man has not notice of that which his agent has actual notice of. The purchaser of an estate has, in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior encumbrance because he was not told of it by his solicitor.

In *Bradley v Riches* (1878) 9 Ch D 189 it was held that the presumption that a solicitor has communicated to his client facts which he ought to have made known cannot be rebutted by proof that it was the solicitor's interest to conceal the facts.

There is, however, an important exception to the above rule in cases of fraud, which is stated in 14 *Halsbury's Laws* (3rd Ed) para 1019 (at p 543) as follows:

> Under the head of actual notice is included notice to an agent employed in the transaction. The notice is imputed to the principal, and it affects him whether communicated to him or not; but an exception is admitted where there has been fraud on the part of the agent in the matter. Although actual communication to the principal is not required, yet fraud excludes in practice all probability of communication, and hence the knowledge of the fraudulent agent is not imputed to the principal.

It is thus clear that his solicitor's knowledge of fraud, if any, cannot be imputed to the respondent. I must therefore reject the appellant's contention that if the respondent had notice by his agent of the previous transactions, then his entering into an agreement to purchase the premises was tantamount to fraud.

It is contended for the appellant that if the respondent had knowledge by his agent of the illegality of the loan transaction and consequently of the transfer by Chooi Mun Sou to the nominee company being void, he cannot be a bona fide purchaser. The authority relied on for this contention is the old case of *Le Neve v Le Neve* (1747) Ainb 436; 26 ER 1172. But the doctrine of constructive notice, which is all that the respondent can be said to have had in this case, is inapplicable, as a rule, to systems of registration in relation to transactions where priority and nciice are governed by priority in or tlie fact of registration. (See 14 *Halsbuty 's Laws of England* (3rd Ed) para 1023 at p 545.). Where the effect of constructive notice would be to invalidate a transaction in relation to sale of land, the court will not readily apply the doctrine. (See 14 *Halsbury's Laws of England* (3rd Ed) para 1022 at p545.)

[18] Likewise in the present case knowledge of second defendant could not appropriately be imputed to the fourth defendant who was not privy to the fraud. The doctrine of constructive notice clearly is inapplicable to the facts in the present ease.

[19] Learned counsel for the plaintiffs further urged the court to draw an adverse inference against the fourth defendant for failing to call one En Khalid bin Sufat, the former managing director of the fourth defendant. It was contended that he was the person who was involved with the loan transaction from the beginning and the 1st defendant admitted having met him with regard to the said loan. However, I find there was no evidence to suggest that he was in any manner involved in only fraud or misrepresentation. As I see it, in so far as the 4lh defendant is concern, it was a straight forward term loan application to be used as part finance of machinery and additional working capital as disclosed in the letter 'P–9'. In the circumstances, I hold that no adverse inference could be drawn against the fourth defendant for failing to call En Khalid.

[20] For the above reasons I hold that the interest of the fourth defendant is not defeasible under s 340(2)(a) of the NLC.

EXCEPTION TO INDEFENSIBILITY UNDER SECTION 340(2)(B) — WHERE REGISTRATION WAS OBTAINED BY FORGERY

[21] The further plank of attack by the plaintiffs is that, the charge is defeasible under s 340(2)(b) on the ground that it was obtained by way of forged document. From the evidence before me, I am satisfied, on balance of probabilities, that the signatures of the plaintiffs both on the charge and the annexure to the charge were forgeries, therefore, I agree with the plaintiffs that the provision of s 340(2)(b) would on the face of it operate against fourth defendant.

[22] Section 340(3) provides that where the title or interest of any person or body is defeasible by reason of the circumstances specified in sub-s (2) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested. The aforesaid provision is, however, subject to one important proviso that nothing in that subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[23] Learned counsel for the fourth defendant contended that the fourth defendant had acquired the interest in the said lands in good faith and for valuable consideration, therefore, the proviso would apply to the facts in the present case. He contended the NLC confers upon purchasers such as the fourth defendant immediate indefeasibiliy of title or interest. He said the old belief that under our Torrens system that registration does not confer immediate indefeasibility in circumstances falling under s 340(2) of the NLC is no longer correct as was held by the Federal Court in the landmark case of *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001]1 MLJ 241. At p 244 the Federal Court stated the position as follows:

> The present National Land Code ('the NLC') was enacted by Parliament in 1965 to be applied to all the states in West Malaysia. In doing so, s 338 of the NLC repealed all earlier land enactments of the states, and those enactments repealed are enumerated in the 11th Sch to the NLC.
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> We are aware that any sovereign country may adopt and apply the Torrens system, but in adopting the system, it may modify the system to suit its own needs. Our Parliament did not slavishly follow the wordings of ss 62, 182 and 183 of Land Transfer Act 1952 of New Zealand, nor the wordings of s 42 of the FMS Land Code. Therefore, to follow the arguments in earlier decisions not based on s 340 of the NLC would only lead to utter confusion. We would therefore proceed to interpret

s 340 NLC as it stands, and find what the real intention of Parliament was when enacting it, for the object of interpretation is to discover the intention of Parliament, and the intention of Parliament must be deduced from the language used.

[24] Further down at p 245 the court said:

Subsection (3) says that where that title is defeasible under any of the three circumstances enumerated under sub-s (2), the title of the registered proprietor to whom the land was subsequently transferred under the forged document, is liable to be set aside. Similarly, sub-s 3(b) says any interest under any lease, charge or easement subsequently 'granted thereout', ie out of the forged document may be set aside.

However, sub-s (3) of s 340 NLC does not stop there. It contains a proviso.

It is a cardinal rule of interpretation that a proviso to a particular section or provision of a statute only embraces the field which is covered by the main provision. The object of a proviso is to qualify or limit something which has gone before it. Its proper function is to except and deal with a case which would otherwise fall within the general language of the main provision of the statute, and its effect is confined to that case. In other words, the object of a proviso is to carve out from the substantive section or clause of a statute, a class or category of persons or things to whom or to which the main section does not apply. The proviso cannot be divorced from the main clause to which it is attached. It must be considered together with the section or subsection of the statute to which it stands as a proviso.

The proviso to sub-s (3) of s 340 of the NLC deals with only one class or category of registered proprietors for the time being. It excludes from the main provision of sub-s (3) this category of registered proprietors so that these proprietors are not caught by the main provision of this subsection. Who are these proprietors? The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of the substantive provision of sub-s (3). For this category of registered proprietors, they obtained immediate indefeasibility notwithstanding that they acquired their titles under a forged document.

We therefore, agree with the High Court judge that, on the facts of this case, even if the instrument of transfer was forged, the respondent nevertheless obtained an indefeasible title to the said lands.

[25] The learned counsel for the plaintiffs contended that the decision of the Federal Court in so far as it relates to the interpretation of the proviso to sub-s (3) of s 340 of the NLC is not binding on this court for three reasons. Firstly it was a mere obiter, and secondly because the court therein failed to consider earlier authorities on the same issue. Thirdly, it is contended that the reasoning of the court runs counter to express words of the section.

[26] On the first point he contended that the High Court did not decide the case on the basis that there was forgery but went on frolic to consider that even if forgery was proved, the defendant nevertheless obtained an indefeasible

title to the land in dispute. He contended that forgery was not in issue before the learned High Court judge, therefore, it was not necessary for the court to decide on the issue. With respect, I am unable to agree with the learned counsel as I find from my reading of both the judgements of the High Court and the Court Of Appeal, forgery was clearly a point in issue. It was the plaintiffs case that the defendant's interest in the land in question is defeasible because it was acquired by way of forged instrument. Reliance was placed on s 340(2)(b) of the NLC.

[27] The learned High Court judge, in his judgment which is reported in [1995] 2 MLJ 863, at p 887 said:

> For the above reasons, I hold that even had I found that forgery had been proved beyond reasonable doubt, the defendant is nevertheless protected and has acquired indefeasible title over the said properties by virtue of the proviso in s340(3) of the NLC. Thus, the law on forgery obtaining in other Torrens systems is also applicable in our Torrens system. It is true that registered landowners should be protected from being divested of their registered interest through fraud or forgery, yet it is also necessary, for the economic well-being of the nation to retain the confidence of prospective innocent purchasers of landed property.

[28] On appeal to the Court of Appeal, the court reversed the finding of the learned trial judge on the premise that the impugned instrument of transfer was a forgery. (See *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62) Based on that finding the court held that the respondent's title is not indefeasible under s 340(2)(b) of the NLC. Gopal Sri Ram JCA in delivering judgment of the court at p 87 observed as follows:

> The New Zealand provisions giving effect to the Torrens doctrine of indefeasibility are therefore fundamentally different from s 340 of the Code. It follows that cases decided under the New Zealand statute must not be treated as concluding the effect of indefeasibility under our law. We do not propose to enter upon a detailed analysis of the differences between the New Zealand provisions and those in the Code. Suffice to say that the sections of the Land Transfer Act 1952 reproduced above, when properly construed, create immediate idefeasibility in favour of an acquirer of land in New Zealand. On the other hand, s 340 of the Code makes defeasible the title of a registered proprietor tainted by one or more of the vitiating elements set out in its second subsection but creates an exception in favour of a bona fide purchaser who takes his title from such a registered proprietor. This bifurcation makes it clear that Parliament intended to confer deferred and not immediate indefeasibility.
>
> That brings us to the rather controversial decision in *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 at p 88 where Gill CJ (Malaya) appears to have made the following pronouncement which appears to favour the doctrine of immediate indefeasibility under the Code.
>
> I am also of the opinion that third parties can acquire rights where a contract is merely unenforceable and not illegal. Assuming that the loan agreement was illegal

so that for that reason the transfer from Chooi Mun Sou to equitable nominees was void, and assuming that that transfer was also void because of the falsity of the attestation clause, registration of the transfer from equitable nominees to the respondent was effective to vest title in him as a registered proprietor notwithstanding that he acquired his interest under an instrument that was void (see *Frazer v Walker* [1967] 1 All ER 649). In *Breskvar v Wall* (1972) 46 ALJR 68 at D 70, Barwick CJ said:

> The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void. The affirmation by the Privy Council in *Frazer v Walker* of the decision of the Supreme Court of New Zealand in *Boyd v Mayor of Wellington* [1924] NZLR 1174 at p 1223, now places that conclusion beyond question.

It is plain that the learned Chief Justice of Malaya relied upon the decision in Frazer to arrive at his conclusion. As we have pointed out, the Privy Council in that case was considering statutory provisions that bear as much similarity to those in the Code as cheese does to chalk. The observations of Gill CJ (Malaya) in *Doshi v Yeoh Tiong Lay* above-quoted, made, as they were, without an analysis of s 340 of the Code and an appreciation of the material differences between the New Zealand statute and our written law must be regarded as per incuriam. It therefore comes as no surprise that authors of Malaysian texts upon the subject have unanimously rejected the views expressed by the learned Chief Justice of Malaya in the foregoing passage.

In our judgment, the following opinion expressed by Dr Visu Sinnadurai in his work entitled *Sale and Purchase of Real Property in Malaysia* accurately summarizes the position that obtains under the Code:

> In Malaysia, it is submitted that under s 340 of the National Land Code, deferred indefeasibility applies. The registered proprietor who had acquired his title by registration of a void or voidable instrument does not acquire an indefeasible title under s 340(2)(b). The indefeasibility is postponed until the time when a subsequent purchaser acquires the title in good faith and for valuable consideration. In other words, a registered proprietor, the vendor, under a sale and purchase agreement, even though he himself does not possess an indefeasible title, may give an indefeasible title to a bona fide purchaser.

We would add that the following obiter dictum of Hashim Yeop A Sani J (as he then was) in *Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53 at p 54 reasonably supports the view held by such academic writers as DrDavid Wong and Judith Sihombing in their respective works which is to the like effect as that expressed by Dr Visu Sinnadurai:

> What the appellant is claiming is in fact the protection of s 340 of the National Land Code. The doctrine carried in s 340 is the doctrine of indefeasibility. What that section protects is that the title or interest of any person for the time being registered as proprietor of any land shall be indefeasible. Subsection (2) of the section provides for the exceptions in that the title or interest shall not be indefeasible in any case of fraud or misrepresentation or where registration was obtained by forgery or by means of an insufficient or void instrument or where the title or interest was unlawfully acquired. This provision deals with what is called 'deferred indefeasibility' about which we are not presently concerned.
>
> We express our agreement with the foregoing interpretation placed upon s 340 of the Code by this eminent judge.

[29] The Court of Appeal held that the words 'any purchaser' in s 340 of the NLC refers to a subsequent purchaser and not an immediate purchaser, hence creating what is often referred to as deferred indefeasibility which only benefits subsequent purchaser.

[30] In *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* the Federal Court reversed the decision of the Court of Appeal. It held that by virtue of the proviso to sub-s (3) of s 340 of the NLC, any purchaser for valuable consideration are excluded from the application of the substantive provision of sub-s (3). It said that for this category of registered proprietors, they obtained immediate indefeasible title to the lands. On the facts of the case the Federal Court held that even if the instrument of transfer was forged, the respondent therein nevertheless obtained an indefeasible title to the land. Eusoff Chin CJ at p 245 reasoned as follows:

> Subsection (2) of s 340 NLC uses the word 'such'. When the word 'such' occurs in a section it must not be ignored, but must be read as referring back to the preceding provision — *Ellis v Ellis* [1962] 1 WLR 227.
>
> Subsection (2) states that the title of any such person, ie any registered proprietor or co-proprietor for the time being, is defeasible if one of the three circumstances in sub-s (2)(a), (b) or (c) occurs. We are concerned here with sub-s (2)(b) where the registration had been obtained by forgery.
>
> Subsection (3) says that where that title is defeasible under any of the three circumstances enumerated under sub-s (2), the title of the registered proprietor to whom the land was subsequently transferred under the forged document, is liable to be set aside. Similarly, sub-s 3(b) says any interest under any lease, charge or easement subsequently 'granted thereout', ie out of the forged document may be set aside.

[31] However, sub-s (3) of s 340 NLC does not stop there. It contains a proviso:

> It is a cardinal rule of interpretation that a proviso to a particular section or provision of a statute only embraces the field which is covered by the main provision. The object of a proviso is to qualify or limit something which has gone before it.

Its proper function is to except and deal with a case which would otherwise fall within the general language of the main provision of the statute, and its effect is confined to that case. In other words, the object of a proviso is to carve out from the substantive section or clause of a statute, a class or category of persons or things to whom or to which the main section does not apply. The proviso cannot be divorced from the main clause to which it is attached. It must be considered together with the section or subsection of the statute to which it stands as a proviso.

The proviso to sub-s (3) of s 340 of the NLC deals with only one class or category of registered proprietors for the time being. It excludes from the main provision of sub-s (3) this category of registered proprietors so that these proprietors are not caught by the main provision of this subsection. Who are these proprietors? The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of the substantive provision of sub-s (3). For this category of registered proprietors, they obtained immediate indefeasibility notwithstanding that they acquired their titles under a forged document.

We therefore, agree with the High Court judge that, on the facts of this case, even if the instrument of transfer was forged, the respondent nevertheless obtained an indefeasible title to the said lands.

[32] From the above it is clear that the crucial issue for the consideration of the court is whether the signature was forged. The High Court did not make a clear finding on this, but went on to hold that even if there had been a forgery, the defendant's title is still indefeasible under the NLC. It is clear from the judgement of the Federal Court that in view of the proviso in sub-s (3) of s 340 of the NLC any purchaser of land in good faith and for valuable consideration is excluded from the provision of sub-s (3) thereof. It necessarily follows that such a purchaser would obtain an immediate indefeasible title even if the instrument of transfer was forged. I am of the view that the above finding is not a mere obiter but the ratio decidendi in the said case. This is confirmed by the finding of the Federal Court in *Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2005] 1 CLJ 565. where an application was made pursuant to r 137 of the Rules of the Federal Court 1995, to set aside the order of the court pronounced on 22 December 2000. Therefore, on that premise I would dismiss the first ground relied upon by the learned counsel for the plaintiffs. Similarly I find no merit in the second and third grounds advanced herein. I am of the view that the decision of the Federal Court is binding on this court despite whatever criticism that may be levelled against it. To hold otherwise would be to go against the principle of *stare decisis*.

[33] The good faith of the fourth defendant was questioned by the learned counsel for the plaintiffs for failing to make enquiry as to the financial standing of the plaintiffs to determine whether they had the capacity to fulfil their obligation under the charge. It is further contended that the fourth defendant ought not to have accepted the valuation of the property by the valuer of the fifth defendant without question. All these, he contended, point to the lack

of good faith on the part of the fourth defendant. On the first issue I think it would be going too far to require the fourth defendant, a bank, to make such an enquiry. It is, in my view, a matter strictly within the discretion of the bank whether to do so or not. Failure to make such an enquiry could not be construed as pointing to the lack of good faith on the part of the 4th defendant. Similarly, I think, it is for the fourth defendant whether to accept the valuation done by the fifth defendant or to have a further valuation done by their own valuer. Failure to do so, could not be treated as evident of lack of good faith on their part.

[34] In the circumstances, I hold that the fourth defendant, being the purchaser in good faith for valuable consideration, had acquired an indefeasible interest in the said lands notwithstanding that the signatures on the charge document and the annexure were forged.

[35] Further on the facts I find that it was the first, second and fifth defendants who were the cause of the loss suffered by the plaintiffs and on that ground I hold that the first and second defendants together with the third, defendant, the firm of solicitors in which the second defendant is a partner, are jointly and severally liable to the plaintiffs for the loss. However, I made no order as against the fifth defendant as the claim against it had earlier on been withdrawn.

[36] On the basis of the foregoing I made the following orders:

(i) prayer (a) of the statement of claim is hereby dismissed;

(ii) order in terms of prayers (d) and (e) as against first, second and third defendants to be assessed by learned senior assistant registrar with interest at the rate of 8% pa from the date of filing of summons to the date of realisation;

(iii) aggravated and exemplary damages against the first, second and third defendants to be assessed by learned senior assistant registrar;

(iv) by consent of the fourth defendant the liability of the plaintiffs to the fourth defendant shall be limited only to the said lands;

(v) the first, second and third defendants are further ordered to pay the plaintiffs costs and the costs of the fourth defendant.

Order accordingly.

Reported by Peter Ling